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No. 00-95

Supreme Court, U.S.
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In The

Supreme Court of the United States

JAMES MADISON STONE,

Petitioner,

v.

AUTOLIV ASP, INC., formerly known as MORTON INTERNATIONAL, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether under the Age Discrimination in Employment Act, 26 U.S.C. § 621 *et seq.* (ADEA), the Tenth Circuit correctly ruled that the record on appeal was not sufficient to show directly or circumstantially that age was a determining factor in the decision to terminate Petitioner James Madison Stone.

CORPORATE DISCLOSURE STATEMENT

Autoliv ASP, Inc. ("Autoliv") has a parent corporation, Autoliv, Inc. Autoliv ASP, Inc. is a wholly owned subsidiary of Autoliv, Inc. No publicly held company owns 10% or more of Autoliv, Inc.'s stock.

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STATEMENT OF THE CASE

Petitioner seeks review of the Tenth Circuit's decision in *Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132 (10th Cir. 2000). In spite of Petitioner's misstatement of the factual record and of the issue on appeal, the Tenth Circuit correctly affirmed summary judgment in favor of Autoliv on Petitioner's age discrimination claim. There is no cause for review in this case. The Tenth Circuit properly applied well settled case law, the Tenth Circuit's opinion is not affected by this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, ___U.S.___, 120 S. Ct. 2097 (2000), and the petition raises no unique issues of law or fact.

Autoliv does not agree with Petitioner's Statement of the Case. Rather than accurately state the case here, however, Autoliv adopts the Tenth Circuit's recitation of the facts in *Stone v. Autoliv ASP, Inc.* for purposes of this brief in opposition. 210 F.3d at 1134-36, 1139, 1141. The Tenth Circuit's published opinion fairly describes the undisputed facts in the record that are material to the question presented.

In addition to adopting the Tenth Circuit's accurate Statement of the Case and rejecting Petitioner's inaccurate statement, Autoliv also points out some of Petitioner's unsupported assertions and some of his mischaracterizations of the evidence in the record.

First, Petitioner cites the Tenth Circuit's decision, *Stone*, 210 F.3d at 1135 and 1139 n.3, as support for most of his factual statements. Even a cursory reading of the Tenth Circuit's opinion, however, demonstrates that it does not support many of Petitioner's factual assertions. For example, Petitioner cites the opinion for claims that

Petitioner "moved steadily up through the ranks." (Petition For A Writ of Certiorari at 2, hereafter "Pet."). However, this assertion is not found in the opinion. Similarly, Petitioner inaccurately cites the opinion for the assertion that Autoliv's reduction in force contained no "divisional goals" or "written plan of reorganization." (Pet. at 3). The Tenth Circuit made no such statement.

Second, Petitioner incorrectly states that Charles Seebock "misled" him regarding the future of his job at Autoliv and that Mr. Seebock was the sole decisionmaker in the decision to eliminate Petitioner's position. (Pet. at 4, 5, 6). Petitioner's factual assertions in this regard are incorrect and, as the Tenth Circuit correctly determined, are belied by the record. *Stone*, 210 F.3d at 1135.

Petitioner himself testified that Mr. Seebock told him he had not had an opportunity to discuss the future of strategic planning with Fred Musone. (Joint Appendix, vol. II at 23-24, hereafter "J.A."). Mr. Seebock testified that "[a] number of people" other than Mr. Seebock were involved in the decision to eliminate Petitioner's position in strategic planning, including Fred Musone, Roger Tea, and Joe Houghtalen. (J.A., vol. II at 173). Thus, the evidence shows that Mr. Seebock was not the sole decisionmaker, and that he was correct when he told Petitioner the decision required input from others.

In addition, the list of names Mr. Seebock prepared was not a final list of eliminated positions as Petitioner alleges. The language of the list itself indicates its tentative nature. It specifically states: "This list is subject to change based on plant changes." (J.A., vol. I at 360-61). Furthermore, the list does not say the people have been

slated for termination, but rather "Here is the tentative list of the folks without a slot." (J.A., vol. I at 360). As Mr. Seebock testified, he was not the sole decisionmaker, and Petitioner cites no contrary evidence.

Moreover, Petitioner's own testimony shows that "upon reflection," he "*believed*" Mr. Seebock had prepared "a hit list" or "list of proposed spots that *might* be terminated." (J.A., vol. II at 95) (Emphasis added). This testimony is speculative and states at most his "belief" that the list's positions "might" be terminated. It does not constitute evidence that Mr. Seebock lied or that Mr. Seebock was the final decisionmaker.

In addition, Roger Tea testified: "They were initially instructed to identify positions as a result of restructuring their organizations. That *eventually* turned into individual incumbents who were affected by it." (Supplemental Appendix at 4, hereafter "Supp. App.") (emphasis added).

Mr. Tea also testified as follows:

> Q Now, he said: "This list is subject to change based on plant changes?"
>
> A That's because this was a very dynamic process. They were still trying to identify and fill positions in the plants. We were still trying to predict, speculate upon what the impact would be with people who might have an option to bump back from an exempt to a non-exempt position. It was a situation that the best we could do is move ahead a step at a time and try to anticipate what would happen.
>
> Q Once you got the list . . . what did you do with it?

> A I would have put it into my desk and done nothing more with it, because it was still an on-going dynamic process leading up to that point in time – which turned out to be the Saturday and Sunday before the reduction in force – a final list of people where the reduction in force were identified.

(Supp. App. at 5).

Finally, Mr. Tea testified: "I did reserve the right to review the list from my perspective to address [issues of good credentials, seniority and loyalty to the company, among other things]," and Mr. Tea changed a "handful" of people based on those issues. (J.A., vol. I at 259-60).

Mr. Tea's testimony indicates that Mr. Seebock's list was tentative at best. The employment decisions regarding the RIF were "ongoing" and "dynamic". Thus, the testimony relied upon by Petitioner for the proposition that Mr. Seebock lied to him regarding the future of his position, and that Mr. Seebock had a "hit list" of people whose jobs were to be eliminated is speculative, not based on the evidence, and cannot preclude summary judgment. *See* Fed. R. Civ. P. 56(e); *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888 (1990); *Branson v. Price River Coal Co.*, 853 F.2d 768, 771-72 (10th Cir. 1988).

REASONS FOR DENYING THE PETITION

Rule 10 of the United States Supreme Court Rules states that a writ of certiorari will be granted "only for compelling reasons." Traditionally, this Court has granted petitions for writs of certiorari when there is a split

among the United States Courts of Appeals, when a United States Court of Appeals differs with a state court of last resort on a federal question, when there is a split among the state courts of last resort on a federal question, or when the issue presented is of such importance that this Court should settle the question. This Court rarely grants a petition for a writ of certiorari when the asserted error consists of "the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

The Petition purports to make two separate arguments, one relating to the correct standard of proof and the other relating to how the Tenth Circuit treated the record on appeal. However, these two separately framed arguments are in fact the same argument. Petitioner's only argument is that the Tenth Circuit misapplied the rule of law by not considering all the evidence. However stated, Petitioner's arguments are not accurate and do not present a "compelling reason" that merits review by this Court.

I. THE TENTH CIRCUIT PROPERLY STATED THE LAW.

Petitioner first claims that the Tenth Circuit imposed an incorrect standard of proof, contrary to this Court's decision in *Reeves*. (Pet. at 8-13). It is unclear what Petitioner means by this statement. To the extent it suggests the Tenth Circuit incorrectly stated the burden-shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), however, it is flatly wrong.

The Tenth Circuit in *Stone* expressly stated the same rule of law as this Court set forth in *Reeves*. The *Stone* court explained:

> Once a defendant asserts a facially non-discriminatory reason for the termination, the presumption of discrimination established by the prima facie showing simply drops out of the picture and the analysis shifts to the plaintiff's ultimate burden of showing that the defendant discriminated on the illegal basis of age. A plaintiff may then resist summary judgment if he or she can present evidence that the proffered reason was pretextual, i.e., unworthy of belief. Effective cross-examination, **combined with the plaintiff's initial evidence, may be sufficient to effect this task**.

Stone, 210 F.3d at 1140 (emphasis added) (internal quotations and citations omitted).

In *Reeves*, this Court explained:

> Respondent met this burden by offering admissible evidence sufficient for the trier of fact to conclude that petitioner was fired because of his failure to maintain accurate attendance records. Accordingly, "the *McDonnell Douglas* framework – with its presumptions and burdens" – disappeared, and the sole remaining issue was "discrimination *vel non*."

Reeves, 120 S. Ct. at 2106 (internal citations omitted). This Court then explained: "the trier of fact may still consider the evidence establishing the plaintiff's prima facie case 'and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual.' " *Reeves*, 120 S. Ct. at 2106 (quoting *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993)).

Both *Stone* and *Reeves* proffer the same rule of law. Petitioner does not challenge the application of the

McDonnell Douglas burden shifting analysis as applied to ADEA claims generally. Therefore, Petitioner's claim that the Tenth Circuit applied the wrong standard of proof fails and his petition should be denied.

II. THE TENTH CIRCUIT PROPERLY APPLIED THE LAW AND PROPERLY CONSIDERED THE ENTIRE RECORD.

Petitioner's second argument appears to be that the Tenth Circuit ignored and/or improperly weighed evidence. (Pet. at 13-17). Petitioner argues that the Tenth Circuit, after concluding that Petitioner established a prima facie case, looked only to Mr. Seebock's one alleged discriminatory comment in determining whether Petitioner established evidence of pretext, and disregarded Petitioner's prima facie evidence. (Pet. at 8-13). Petitioner claims that such an analysis is contrary to *Reeves*, and had the Tenth Circuit considered both the prima facie case evidence as well as the statement of Mr. Seebock, it would have necessarily concluded that Petitioner met his burden of proof on the element of pretext and reversed the district court's grant of summary judgment. Petitioner is mistaken.

First, *Reeves* and *Stone* dealt with entirely different issues. *Reeves* addressed whether "plaintiff's prima facie case of discrimination, combined with **sufficient evidence** for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination." *Reeves*, 120 S.Ct. at 2104 (internal citations omitted) (emphasis added). The Tenth Circuit in *Stone*, on

the other hand, addressed whether Petitioner established evidence of pretext in the first instance. *Stone*, 210 F.3d at 1134-35. The *Reeves* analysis dealt exclusively with the appropriate burden of proof necessary for determining ultimate liability **after** the plaintiff satisfies his burden of proof regarding pretext, not with the standard of proof necessary to establish pretext. Thus, *Reeves* does not change or impact the Tenth Circuit's analysis in *Stone*. The two cases simply do not conflict.

Second, Petitioner incorrectly presupposes that he presented sufficient evidence to establish pretext. However, the Tenth Circuit determined, after reviewing the entire record, that Petitioner failed in that regard. The Tenth Circuit did not ignore the evidence in the record, as Petitioner suggests. To the contrary, the Tenth Circuit noted several times that it reviewed the entire record. For example, the Tenth Circuit explained: "our review of the record simply does not support Stone's position that there is more to his claim of pretext than this [Mr. Seebock's] stray remark." *Stone*, 210 F.3d at 1140. Similarly, the court explained, "examining Seebock's comment **in light of all the evidence**, we conclude it is insufficient for a reasonable jury to infer that age was a determining factor in the decision to terminate Stone." *Id.* at 1141 (emphasis added). Contrary to Petitioner's assumptions, the Tenth Circuit did not ignore the evidence, but rather determined that the evidence did not support Petitioner's claims. The Tenth Circuit concluded that Petitioner failed to meet his burden of proof for summary judgment purposes after viewing the record as a whole. *Id.* at 1141.

Petitioner finally claims that the *Stone* court ignored evidence and erroneously drew inferences against him.

(Pet. at 13-14). Petitioner confuses "ignoring the evidence" with the Tenth Circuit's analysis and conclusion that the evidence presented, with the inferences drawn therefrom, does not create a genuine issue of material fact precluding summary judgment. The Tenth Circuit indeed considered all the evidence and even provided a lengthy analysis of the evidence. *Stone,* 210 F.3d at 1141. The Tenth Circuit found that Petitioner clearly failed to present evidence to support his claim.

For example, Petitioner claimed Mr. Seebock was the sole decisionmaker in Autoliv's decision to eliminate Petitioner's position. However, as explained above, this claim is not supported by the record and the Tenth Circuit so found. *Id.* at 1135. Petitioner cannot create an issue of fact merely by asserting and assuming it to exist.

Furthermore, Petitioner could not dispute that his job was eliminated in a RIF affecting over 324 jobs, that the net result of the RIF was to increase the number of employees forty or older at Autoliv, that the alleged discriminatory statement at issue was the only one Mr. Seebock ever made to Petitioner in the eight years they worked together, that Petitioner was not sure Mr. Seebock knew Petitioner's age, that before the elimination of Petitioner's job, Mr. Seebock contacted at least three people in the company trying to find Petitioner an opening, and that at the time of the RIF there was no position available that matched Petitioner's skills and talents. *Id.* at 1141.

Based on **all** the evidence, the Tenth Circuit determined that Petitioner failed to establish a genuine issue of material fact regarding pretext. Petitioner's assertions

otherwise were unsupported. *Id.* The Tenth Circuit correctly applied the proper rule of law.

III. THE PETITION FAILS TO MEET THE REQUIREMENTS OF RULE 10.

Finally, even if there were merit to any of Petitioner's claims, the Court should still deny his petition because it does not meet the requirements of Supreme Court Rule 10. Petitioner does not challenge the application of the *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 36 L. Ed.2d 668, 93 S. Ct. 1817 (1973) burden shifting analysis to the ADEA. This case does not involve a split among the circuit courts, does not represent a difference of opinion on a federal question between a Court of Appeals and a state court of last resort, and does not establish a rule of law that has not been, but should be, settled by this Court.

At best, the petition might be construed as a challenge to the Tenth Circuit's application of the *McDonnell Douglas* test, as clarified by *Reeves,* to the facts of this case. Improper application of a proper rule of law, however, does not fulfill this Court's requirements for review because it rarely constitutes a "compelling reason" sufficient to warrant granting a petition for a writ of certiorari. *See* Sup. Ct. R. 10. There is nothing factually or legally unique about this case to justify having this Court depart from its normal practice under Rule 10. Thus, Petitioner's application for review should be denied.

CONCLUSION

Petitioner's arguments provide no basis for this Court to grant the Petition. The Tenth Circuit relied on the proper rule of law and properly applied that law in determining that Petitioner failed to produce sufficient evidence to overcome Autoliv's facially nondiscriminatory reason for Petitioner's termination. The *Reeves* decision does nothing to alter either the Tenth Circuit's analysis or the outcome of the case. The Tenth Circuit properly held that no genuine issues of material fact existed and that Plaintiff failed to offer sufficient evidence to take the case to a jury. Accordingly, Petitioner has not shown a compelling reason for this Court to review this case and his Petition for Writ of Certiorari should be denied.

DATED: August 15, 2000.

Respectfully submitted,

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